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IN THE

Supreme Court of the United States

October Term, 1939

No. 977

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

REPLY BRIEF FOR PETITIONER

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POINT 1—THE REVERSAL OF THE KNIESS CASE BY THE SUPREME COURT OF OHIO WAS BASED ON A MISJOINDER OF PARTIES DEFENDANT, AND NOT UPON A MISJOINDER OF CAUSES OF ACTION

We desire to correct certain inaccuracies in the brief filed by the respondent, as follows:

On page 3 of respondent's brief, it is stated that the Supreme Court of Ohio in its decision in the case of *George Kniess vs. Armour & Co.*, 134 O. S. 432, reversed

the judgment which Kniess had obtained on the grounds, among others, that:

> "2. Separate causes of action against different defendants may only be joined where the liability is joint; and joinder of such distinct causes of action is improper in the instant case under the Ohio statute."

Again, on page 12 of respondent's brief:

> "The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess* case that two separate suits had been improperly combined in the petition."

The foregoing quotations would appear to imply that the ruling of the Supreme Court of Ohio in the *Kniess* case, *supra*, was that there was a misjoinder of causes of action.

Such an impression would be fortified by the quoted provisions of Section 11312, Ohio General Code, on page 13 of the brief for respondent, which statute relates to the procedure if causes of action are misjoined.

The fact is, however, that the Supreme Court of Ohio held that on the allegations of plaintiff's petition, considered alone, there was a misjoinder of parties defendant.

This appears in the second paragraph of the syllabus of the case, reading as follows:

> "2. In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (*Canton Provision Co. vs. Gauder*, 130 Ohio St. 43, approved and followed.)"

Section 11309, Ohio General Code, provides that the defendant may demur to the petition only when it appears on its face either:

> "5. That there is a misjoinder of parties plaintiff or defendant; * * *.
>
> "7. That several causes of action are improperly joined."

Section 11312, Ohio General Code, which as we have said is quoted on page 13 of respondent's brief, concerns only the seventh ground of special demurrer, and has no application to the fifth ground of misjoinder of parties defendant, which was the demurrer actually filed by both Armour & Company and the defendant, Charles J. Burmeister, in the *Kniess* case.

Section 11365, Ohio General Code, is the applicable provision where a demurrer on the fifth ground, such as this, was sustained. It reads, so far as here pertinent:

> "If the demurrer be sustained, the adverse party may amend if the defect thus can be remedied, with or without costs, as the court directs."

POINT 2—PLAINTIFF GEORGE KNIESS COULD NOT HAVE MAINTAINED A PETITION FOR CERTIORARI IN THIS COURT TO REVIEW THE STATE COURT'S ORDER OF REVERSAL

It is suggested on page 4 of respondent's brief that Kniess could have filed his petition for a writ of *certiorari* in this court, as provided by Title 28, Section 344(b), U. S. C. A., to review the order of reversal made by the Supreme Court of Ohio in the *Kniess* case, 134 O. S. 432.

As the statute in question only affords the right to *certiorari* in certain enumerated cases which are, where a judgment or decree has been rendered by the highest

court of the state where is drawn in question the validity of a treaty or a statute of the United States, or the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, it is clear that no petition for *certiorari* could have been entertained by this court to review the judgment of reversal by the Supreme Court of Ohio in the *Kniess* case, *supra*, because none of those necessary elements or grounds for review existed.

Instead, the only question passed upon by the Supreme Court of Ohio in that case was whether the petition of the plaintiff Kniess, tested by the rules of pleading in force in the State of Ohio, stated a cause of action in which the two defendants were properly joined.

On that question, the decision of the Supreme Court of Ohio was final. This was settled by this court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64.

But the question still remains, may the United States Circuit Court of Appeals issue its writ of mandamus to the judge of the United States District Court, to compel the latter to revoke an order of remand to the state court, which order of remand is based upon facts not presented to and therefore not considered by the state court, which ordered the removal in the first place?

Respectfully submitted,

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

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